Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	

AT&T's OPPOSITION TO PETITION FOR FORBEARANCE OF BELLSOUTH TELECOMMUNICATIONS, INC.

Leonard J. Cali
Lawrence J. Lafaro
Richard H. Rubin
Clifford K. Williams
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 09721
(908) 532-1847
Counsel for AT&T Corp.

December 20, 2004

Executive Summary

On the surface, BellSouth's Petition gives the appearance of a simple request for "regulatory equity." But appearances are deceiving. There is much more at stake here than either BellSouth or the Petition admits. A thorough review of the Petition's carefully crafted language reveals that what is really at stake is the continuation of a market environment capable of nurturing innovative, robust and low-cost broadband applications and Internet access services.

The Petition effectively asks the Commission to turn the entire future of wireline broadband services in BellSouth's region over to BellSouth's monopoly control. Thus, the Commission's decision here will determine whether residential and business customers will be served by a dynamic, open and vibrantly competitive marketplace or by an environment that is dominated by market power.

BellSouth's request is the zenith of a well-orchestrated and well-rehearsed public advocacy campaign by the Bells to give them *carte blanche* to re-monopolize virtually every aspect of wireline telecommunications in their operating territories. Allowing the Petition to become effective would seriously jeopardize the Act's and the Commission's goal to deliver a diversity of new and innovative broadband capabilities to American consumers.

Critically, the Petition does not seek relief necessary to provide BellSouth with incentives to provide new broadband access to previously unserved customer locations. Indeed, that is unnecessary, because it has already been granted such relief. Instead, BellSouth is now seeking the right to assert totally unregulated control of all bandwidth in its network in excess of a few voice grade equivalents.

The Petition is both stunningly broad in its reach and totally baseless. Its breadth is highlighted by the fact that BellSouth seeks this unprecedented relief for all technologies that are merely "capable" of providing modest broadband functionality, *i.e.*, 200 kbps in both directions. Thus, it applies not only to broadband access to the internet, but also to a vast array of basic transmission capabilities long used by non-affiliates to provide services to small business and enterprise customers.

The Petition's utter lack of merit is highlighted by the fact that it offers virtually no evidence at all showing that non-affiliated information service providers ("ISPs") and other broadband service and applications providers ("collectively non-affiliated broadband providers") -- or even basic wireline providers -- have significant wholesale options. Moreover, the Petition seeks relief from fundamental nondiscrimination requirements that apply to *all* network providers, not just to providers that wield market power. Further, it totally fails to comply with the rigorous requirements necessary to support a forbearance request under Section 10 of the Communications Act.

If the sweeping relief sought by the Petition were granted, it would not only severely jeopardize the development of a competitive broadband retail market, it would also threaten competition in the market for traditional services. Thus, if the Commission were to allow the requested relief to become effective, it would not only have a devastating effect on broadband innovation and competition, but it could also totally deregulate BellSouth facilities that competitive carriers must use as essential inputs to a wide variety of traditional basic telecommunications services, particularly to small business and enterprise customers. If BellSouth (or other Bells) were given such unfettered control over the terms, conditions – and even the possibility – of access to their

basic network transmission capabilities necessary to access both traditional and broadband services and applications, they would be handed the keys to monopoly power over of all such services.

BellSouth's request is not about limiting access to its facilities at regualtorily prescribed rates such as those generated by the TELRIC pricing methodology. Rather, it is a request for authority to provide -- or to refuse to provide -- service with absolutely no constraints, even the most basic requirements not to act in an unjust, unreasonable or discriminatory manner. That is utterly at odds with Title II, which applies to *both* dominant *and* non-dominant carriers, and provides that *all* common carrier telecommunications services are subject to the general requirements of just, reasonable and nondiscriminatory treatment imposed by Sections 201 and 202 of the Act and related provisions, such as Sections 207 and 208, which are necessary to enforce those obligations. Yet BellSouth's Petition would sweep away all of those and other fundamental Title II requirements and replace them with -- nothing at all. Similarly, the Commission long ago recognized in its *Computer Inquiries* decisions that regulatory rules are needed to ensure that competitive providers of downstream retail services have nondiscriminatory access to the basic wholesale transmission services that are essential to support competition in retail enhanced and information services. Nothing has changed in the marketplace that warrants the removal of these key *Computer Inquiries* requirements.

The Bells' continuing control over the basic network infrastructure needed to access broadband services and applications, combined with the lack of competitive alternatives to the Bells' wholesale transmission services, means that retention of these fundamental regulatory requirements is essential to foster a competitive broadband

market. If these requirements were withdrawn, no non-affiliated broadband provider could craft a viable long-term business case. Competitive applications developers would not have access to essential bandwidth except by the Bells' permission. And given the Bells' monopoly control over the only viable wholesale facilities that enable end users to access those services, they would have total freedom to provide that essential bandwidth on any terms and conditions they saw fit – or simply to refuse to provide access at all.

Thus, the fundamental question raised here is whether the Commission will retain modest regulatory rules that assure new entrants may use long-existing bandwidth capacities to reach customers regardless of underlying technology, or whether it will grant the entrenched monopolists not only a franchise to use untapped bandwidth but also the bandwidth that has long made available to serve customers. The answer to that question should be obvious, because Section 706 of the Act was designed to promote competition, not to create a new digital age where customers have "0" choice of suppliers and only "1" choice of product.

TABLE OF CONTENTS

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	

AT&T's OPPOSITION TO PETITION FOR FORBEARANCE OF BELLSOUTH TELECOMMUNICATIONS, INC.

Pursuant to the Commission's Public Notice in the above-captioned docket,[1] AT&T Corp. ("AT&T") hereby submits this Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth's") petition seeking forbearance from enforcement of Title II common carriage requirements and the *Computer Inquiries* rules (the "Petition").[2]

I. INTRODUCTION

To date, the Commission has sought to promote the national deployment of broadband facilities and to increase the bandwidth available to retail customers, but its focus has properly been upon extending incentives that are focused on the provision of

[1] *See* Public Notice, WC Docket No. 04-405 (November 3, 2004).

[2] *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, Docket No. 04-405, DA No. 04-3507, (filed October 27, 2004) (the "Petition") .

additional bandwidth to previously unserved broad categories of customers. There is clearly no public policy purpose served by adopting rules that require uneconomic investment in essential facilities when existing facilities generally meet customers' needs and competition can be preserved with only modest regulatory oversight (*e.g.*, requiring access to DS1 and DS3 facilities to serve business customers, DSL capable loops to serve residential customers). However, BellSouth's Petition seeks to twist the Act's and the Commission's broadband goals, requesting unprecedented and totally unwarranted relief from core statutory and Commission protections for virtually all telecommunications services. The Petition must therefore be rejected.

BellSouth's claims here are based on the false premise that the relief it seeks will advance the Commission's broadband agenda. In fact, if the Commission were to grant the requested relief, it would create the exact opposite result, giving BellSouth completely unfettered control over virtually all bandwidth in its network -- the essential resource required to deliver any broadband service or application. Thus, the Commission must not take BellSouth's bait; rather, it must apply the clear law and its own precedent and reject the Petition.

The Petition relies upon a series of false, sleight-of-hand claims to argue that nascent competition in a limited number of *retail* broadband services markets warrants virtually unlimited deregulation of an ILECs' monopoly *wholesale* last-mile facilities that are merely "capable" of providing broadband services, regardless of the nature of those services -- whether broadband or narrowband -- and regardless of whether or not the affected customer class previously had access to the bandwidth in question. But evidence of *retail* competition says absolutely nothing about the need to retain essential statutory

and Commission rules that require just, reasonable and nondiscriminatory provision of *wholesale* services competitors require to provide their own retail broadband and information services.

Moreover, BellSouth's ill-defined request for relief is so broadly and vaguely couched that, if granted, it would fully deregulate not only BellSouth's provision of retail broadband services but also its provision of wholesale services necessary to provide *all* competitive services, both broadband and traditional, for virtually *all* end users. Indeed, the audacious nature of the requested relief shows that the Petition is not really about BellSouth's promises to extend bandwidth to end user customer classes that currently lack such access. Rather, it is an effort to extend BellSouth's monopoly power over last-mile facilities into virtually *all* telecommunications services markets without *any* regulatory constraints at all -- even those that currently apply to non-dominant carriers. This effort is both unprecedented and unsupported by the specific evidence necessary to support a forbearance request. Accordingly, BellSouth's Petition must be denied.

Even setting aside the larger broadband policy imperatives, the Petition is patently deficient, both substantively and procedurally. BellSouth seeks sweeping forbearance from key statutory and Commission nondiscrimination requirements that are essential to support continued broadband deployment and competition. And critically, the Petition proffers an extraordinarily expansive definition of "broadband," including any "technologies that are capable of providing 200 kbps in both directions." Petition at 1, n.2. This extraordinarily broad definition not only encompasses many advanced and information services, but also potentially includes traditional private line and special

access services, and a virtually unlimited array of the networks and technologies that have historically been used to provide basic transmission services.

Beyond its enormously broad scope, the Petition fails to describe accurately the regulatory rules from which BellSouth seeks relief, or to explain adequately the actual market conduct, context and dynamics that underlie the purpose of Title II regulation and that led the Commission to adopt its *Computer Inquiries* rules.[3] Instead, like earlier Bell requests for forbearance and other unwarranted regulatory relief, BellSouth asks the Commission to de-regulate first, based on vague promises of future fair play, and only ask questions later, without regard for the consequences on customers, competition, or the public interest. Given the groundless and unsupportable nature of its requested relief, BellSouth's approach is hardly surprising, but its Petition must be summarily rejected.

The relevant facts here are simple and straightforward. Title II requirements principally impose duties that require telecommunications carriers to follow just, reasonable and nondiscriminatory practices, and they provide Commission complaint remedies to those who are injured when a carrier fails to adhere to such fundamental requirements. Critically, these duties apply to *all* carriers, not just those, such as BellSouth, that wield enormous market power. Nevertheless, BellSouth seeks to avoid these and other Title II duties under the guise of "regulatory parity." That is nonsense.

---

[3] The "*Computer Inquiries*" refers, collectively, to: Final Decision and Order, Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Service and Facilities, 28 FCC 2d 267 (1971) ("*Computer I*"); Final Decision, Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)("*Computer II*"); Amendment of Section 64.702 of the Commission's Rules and Regulations -- Phase I, Report and Order, 104 FCC Rcd 958 (1986) ("*Computer III*").

Similarly, the Commission's *Computer Inquiries* regime was enacted precisely to promote competition for consumers by assuring that competitors such as ISPs have just, reasonable and nondiscriminatory access to vital basic inputs necessary to provide competitive retail information and broadband services and applications. Thus, the *Computer Inquiries* rules were specifically adopted to limit anticompetitive conduct by entities, such as the Bells, that have market power at the network level through their control of bottleneck last-mile facilities. The *Computer Inquiries* rules seek to promote vigorous competition for information and broadband services by "provid[ing] a mechanism whereby non-discriminatory access can had to basic transmission services by all enhanced services providers."[4] These rules are so vital to the development of competition that the core *Computer Inquiries* non-discrimination obligations apply not only to carriers with market power such as the Bells, but also to facilities-based carriers that lack market power, such as unaffiliated facilities-based ISPs.[5] To ensure that these core non-discrimination requirements are given full effect, the *Computer Inquiries* regime further recognizes the ILECs' unique ability and incentive to discriminate by imposing additional structural and non-structural safeguards on entities with market power.[6] Thus, the Commission's *Computer Inquiries* rules and the court decisions upholding those rules have always recognized that unfettered and non-discriminatory

[4] *Computer II*, ¶ 231.

[5] *Computer III*, ¶¶ 100-265; 1998 Biennial Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Report and Order, 16 FCC Rcd 7418, ¶ 4, n.16, (2001)("*Enhanced Services Unbundling Order*").

[6] *Computer III*, ¶¶ 100-265.

access to basic transmission facilities is essential to the full and expeditious development of a competitive market for information and enhanced services.

There is nothing about the technology or market characteristics of the facilities and services the Petition describes as "broadband" that could possibly justify Commission forbearance from the existing *Computer Inquiries* regulations. Notwithstanding any changes that have occurred in retail markets since the *Computer Inquiries* rules were adopted, the fact remains that ILECs generally remain the only source for the basic network building blocks that non-affiliated broadband providers need to provide retail information and broadband services with reasonable market coverage, *i.e.*, bandwidth to the customer. As a result, there is no doubt that ILECs will -- absent regulation -- continue to have both the incentive and ability to use their bottleneck control of these essential inputs to stifle competition in the provision of new and developing broadband and advanced services.

The inadequacies of BellSouth's justifications for the requested relief are as broad as the relief itself. Indeed, given the BellSouth's continuing market power, the Commission simply cannot grant this blunderbuss request. Doing so would grant BellSouth unprecedented authority to wield and abuse its enormous market power to harm both competitors and competition -- as it has recently attempted to do in the special access market. The Commission has not jettisoned the core requirements and protections of Title II in the past, even where it has deemed markets effectively competitive. Instead, it has properly retained and enforced the core requirements and protections of Title II and the *Computer Inquiries* rules to ensure that markets are, and will remain, competitive. The record compels the same result here.

In particular, preservation of existing Title II tariffing requirements is also essential in these circumstances. Tariffing and related regulations perform an invaluable, pro-competitive role by providing needed transparency and by reducing transaction costs -- all at very little expense to the ILECs. Without such transparency, it would be nearly impossible for competitors who have been harmed to enforce their rights under sections 201 and 202 to be protected against unjust, unreasonable or discriminatory rates or conditions. In addition, tariffing with cost support aids in preventing price squeezes in downstream retail broadband services markets.

BellSouth further requests that the Commission forbear from applying its Part 64 accounting rules to facilities used to provide broadband information services. The Commission should decline to do so. If the Commission grants BellSouth's request, ILECs could force their basic telecommunications customers to absorb all of the costs of any facility that is used to provide both basic telecommunications and broadband information services. Such improper cross-subsidies would plainly have an adverse effect on competition and consumers. Nor, as BellSouth suggests, does the Commission's adoption of the current price cap regime obviate the need for Part 64 cost allocation. Because the ILECs retain the ability and incentive to over-allocate joint costs to their regulated telecommunications operations in order to cross-subsidize their broadband information services, the Commission must retain the existing Joint Cost rules.

BellSouth has equally failed to show any no reason why it should be allowed to evade numerous Title II regulations designed to promote other public policy objectives. Thus, there is no basis to forbear from subjecting BellSouth to Title II regulations that

ensure (i) the availability of 911 and E911 services to promote public safety, (ii) persons with disabilities to have access to the telecommunications network, and (iii) law enforcement can intercept transmissions to protect the public. The Commission should also decline to exempt BellSouth from its universal service fund ("USF") obligations.

BellSouth also has not remotely satisfied the requirements for forbearance under Section 10. As a threshold matter, BellSouth's Petition is patently insufficient, and applicable law requires that it be denied on its face. *First*, the Petition fails to provide a meaningful definition of the geographic markets where BellSouth seeks relief, and it provides no data relevant to such markets. Instead of providing information on the *local wholesale* alternatives necessary to support competition, BellSouth's data focus exclusively on national, retail data. Thus, the Petition leaves the Commission without an utterly inadequate basis on which to make the factual findings required to support a forbearance request. *Second*, the Petition fails to adequately define the services for which BellSouth seeks relief, couching its forbearance request in extraordinarily broad terms that would free BellSouth from virtually all regulation over a wide array of both broadband and traditional basic services. This fatal flaw precludes the Commission from fulfilling its mandatory duty to consider *specific* market conditions with regard to *specific* services. As a result, BellSouth has clearly failed to sustain its burdens at the most fundamental, threshold level, and the Commission need not even examine any of the specific requirements of Section 10(a) before rejecting the Petition.

But if the Commission were to consider BellSouth's Petition on the merits, it must be rejected, because it fails on every score. Section 10(a) requires the Commission to "deny a petition for forbearance if it finds that *any one* of the three prongs [of the

statutory forbearance test] is unsatisfied."[7] BellSouth's Petition fails to satisfy a single one of those requirements.

Specifically, Section 10(a)(1) requires BellSouth to demonstrate that enforcement of the Title II and *Computer Inquiries* regulations from which it seeks forbearance is not necessary to ensure just, reasonable, and non-discriminatory rates, terms and conditions for access to last-mile inputs into competitive broadband and basic services. But BellSouth's "evidence" on these issues is limited to irrelevant data on *retail* competition, not the *wholesale* services that are the exclusive focus of the Title II and *Computer Inquiries* regulations. And there is no question that unaffiliated competitive providers do not have wholesale alternatives for the basic telecommunications services they need to provide both broadband services and applications and basic services for small business and enterprise customers.

Indeed, the evidence is totally to the contrary. Cable providers do not provide adequate wholesale broadband access alternatives to constrain the incumbent LECs' market power over inputs needed by non-affiliated providers. And even if there were substantial wholesale competition from cable providers (which there is not), the existence of such alternatives would show, at best, a duopoly in the relevant geographic market, which the courts and the Commission hove routinely found is insufficient to promote vigorous competition. That is because there is simply no evidence of any other appreciablewholesale competition. Indeed, both the Commission's own data and the assessments of those competitive suppliers show that virtually no such competition exists.

[7] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (emphasis added).

BellSouth also fails to satisfy Sections 10(a)(2) and (3), which require it to demonstrate that enforcement of Title II obligations and the *Computer Inquiries* requirements are not necessary to protect consumers and that forbearance would promote the public interest by promoting competition.[8] It is obvious that only continued enforcement of Title II obligations and the *Computer Inquiries* requirements will protect consumers and promote retail competition, by ensuring that BellSouth cannot discriminate against non-affiliated providers of competitive retail services. Indeed, a review of BellSouth's argument on these points only confirms this conclusion. Its claim that the *Computer Inquiries* regulations require it to incur significant costs for redundant, structurally separate operations is simply wrong, and its assertion that the current regulations impede its ability to offer information services to broadband providers simply cannot be credited.

Finally, BellSouth's appeal to the Commission to balance the costs of regulation against supposedly enhanced incentives for ILEC broadband investment as part of Section 10 analysis is barred by the plain language of Section 10(a). Any such balancing -- if permitted at all -- is limited to the public interest prong of the forbearance test. And since BellSouth has totally failed to demonstrate compliance with the first two prongs of the test, the clear statutory requirements preclude the use of such balancing to justify forbearance.

[8] *See* Section 10(b).

II. THERE IS NO RATIONAL BASIS FOR CREATING A BROADBAND EXEMPTION FROM THE CORE NON-DISCRIMINATION OBLIGATIONS IMPOSED BY EITHER TITLE II OR THE *COMPUTER INQUIRIES*.

The Petition requests that the Commission forbear from enforcing the core non-discrimination obligations of both Title II and the *Computer Inquiries* regime. The Commission cannot forbear from enforcing either of these independent non-discrimination obligations.

A. There is No Basis for Any "Broadband" Exemption from the Nondiscrimination Obligations of Title II.

The Commission should make no mistake about what BellSouth is requesting in the Petition. With respect to last-mile broadband transport facilities, the Petition would strip away *all* of the core obligations imposed on telecommunications carriers by Title II, including those prohibiting unjust and unreasonable practices (section 201) and discrimination (section 202), and those providing for privately-initiated causes of action for damages for violations of the Act (sections 207-09). Thus, BellSouth is seeking the unprecedented legal right to *refuse altogether* to provide basic last-mile broadband transport -- including special access services -- to unaffiliated carriers and ISPs. Similarly, BellSouth seeks the Commission's permission to *discriminate at will* against and between non-affiliated carriers, ISPs, and service and applications providers in its provision of essential last-mile broadband transmission capabilities (if and when it chooses to provide those parties with any access at all), and to deny non-affiliates any recourse under the Title II complaint processes. Such prerogatives are antithetical to the core purposes of Title II, and the Commission has *never* granted such a right to *any* telecommunications carrier at *any* time, either dominant carriers such as BellSouth or non-dominant carriers. There is no legitimate basis upon which the Commission may

grant BellSouth such extraordinary relief, and the Petition fails to offers any rationale justifying such a radical shift in Commission policy.[9]

BellSouth asserts that Title II common carrier regulation is no longer necessary because the ILECs are subject to "vigorous intermodal competition."[10] As an initial matter, the Commission may not forbear from enforcing the requirement that the ILECs provide non-affiliated ISPs with non-discriminatory access to the basic telecommunications services the incumbents use to provide information services, because

[9] The "relief" BellSouth seeks goes well beyond any relief the Commission has previously even considered granting. In the *ILEC Broadband Non-Dominance Notice*, the Commission proposed to continue to require the ILECs to provide broadband telecommunications service on a common carrier basis, while eliminating dominant carrier regulations applicable to some of these services. *See ILEC Broadband Non-Dominance Notice,* 16 FCC Rcd at 22763-69. Here, by contrast, BellSouth seeks *complete* elimination of Title II common carrier regulation, including the obligations of Section 202(b) to provide telecommunications services on just, reasonable, and non-discriminatory prices, terms, and conditions. Moreover, the Petition apparently seeks deregulation of *both* broadband services *and* special access services, which the Commission specifically excluded from consideration in the *ILEC Broadband Non-Dominance* proceeding. *See id.* at 22758 (noting that the proceeding did not address regulatory treatment of "traditional special access services . . . [which] are governed by the Commission's pricing flexibility regime"). Similarly, BellSouth's Petition seeks more extensive deregulation than the Commission proposed -- and has thus far declined to grant -- in the *Broadband Wireline ISP Notice,* where the Commission proposed to eliminate application of the *Computer II* unbundling requirement to mass market telecommunications services, such as digital subscriber line ("DSL"), that the ILECs use to provide broadband Internet access service. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3040-43 (2002) ("*Broadband Wireline ISP Notice*") (seeking comments regarding application of the *Computer Inquiries* rules "to self-provisioned wireline broadband Internet access service"). Here, by contrast, BellSouth demands forbearance (which is deemed automatically granted in the absence of Commission action, *see* Section 10(c)) from application of the *Computer II* unbundling requirements to *any* telecommunications service that an ILEC can use to provide *any* information service. BellSouth's Petition further seeks elimination of the Joint Cost Rules, another action the Commission has never proposed. *See Broadband Wireline ISP Notice,* 17 FCC Rcd at 3040-43.

[10] Petition at 18.

doing so would be directly violate Section 10 of the Act. That section, which is the Commission's sole source of forbearance authority,[11] does not permit the Commission to forebear from enforcing any statutory provision that is necessary to ensure that a carrier's charges or practices are not "unreasonably discriminatory."[12] And the principal purpose of Sections 201 and 202 (and the related provisions of Title II that are necessary to implement those requirements) is to enforce exactly those obligations.

Section 202(a) of the Act prohibits carriers -- both dominant and non-dominant -- from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service.[13] The Commission has held repeatedly that this provision imposes an *independent* obligation -- separate from those in the *Computer Inquiries* rules -- that requires *any* facilities-based carrier that provides information services to (i) offer the transmission capacity used to provide its information services on a stand-alone basis and (ii) make that capacity available to competing ISPs on a non-discriminatory basis.

Thus, in the *Interexchange Marketplace Reconsideration Order*, the Commission observed that "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[14] Similarly, in the *Frame Relay Order*, which held that the *Computer II* rules required

---

[11] *See ASCENT v. FCC*, 235 F.3d 662 n.7 (D.C. Cir. 2001) (noting the Commission's conclusion that Section 706 of the Telecommunications Act is not an independent basis of forbearance authority).

[12] 47 U.S.C. § 160(a)(1).

[13] 47 U.S.C. § 202(a).

[14] *Competition in the Interstate Interexchange Marketplace*, Memorandum Opinion and Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

AT&T to unbundle its basic frame relay service, the Commission stated that "Section 202 of the Act also prohibits a carrier from discriminating unreasonably in its provision of basic services."[15] And, more recently, in the *CPE/Enhanced Service Bundling Order*, the Commission re-iterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced [information] service providers."[16] The Commission further recognized that "discrimination . . . that favor[s] one competitive enhanced service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[17]

Continued application of Sections 201 and 202, as well as the related Title II provisions, which ensure implementation of those requirements, is clearly necessary to prevent the ILECs from discriminating unreasonably against non-affiliated providers. The Commission has indisputable evidence that the ILECs, including especially BellSouth, will in fact discriminate in the provision of wholesale telecommunications services against firms offer competitive services in "downstream" markets. Just this month, the Commission concluded, in a complaint proceeding brought under Section 208, that BellSouth had engaged in unlawful discrimination in the provision of special access service -- an essential input for data-intensive long distance service provided to enterprise

[15] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995).

[16] *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001).

[17] *Id.* at 7445-46.

customers -- by offering greater discounts to BellSouth's long-distance affiliate than to non-affiliated long-distance competitors.[18] Since BellSouth has already demonstrated its willingness to discriminate against wholesale customers that compete against it in the data-intensive long-distance enterprise market, there is every reason to believe that BellSouth will seize upon any opportunity to discriminate lawfully in the provision of wholesale inputs to its competitors in the retail information and broadband services markets. Section 10 precludes the Commission from using its forbearance authority to allow BellSouth or other ILECs to do so.[19]

BellSouth has expressly acknowledged that if the Commission grants its Petition it will provide service on a "private carrier" basis.[20] As a private carrier, BellSouth could simply *refuse* to provide service to a non-affiliated broadband provider -- or could impose unjust, unreasonable and discriminatory terms on its provision of such services at its whim. The Bells' networks were built for, and have always been operated to provide transmission capabilities to, any customer who requests it. Common carriage is the wireline rule, and private carriage the rare exception that applies only to ancillary or

---

[18] *See AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

[19] *See ASCENT v. FCC,* 235 F.3d at 666 (Commission may not "circumvent" the limitations on its forbearance authority based on a determination that the "advanced services" market is competitive). Thus, contrary to BellSouth's assertion, *see* Petition at 29-30, the Commission may not allow a common carrier to provide telecommunications service on a private carrier basis merely because the Commission determines the market is competitive. *See NARUC v. FCC,* 525 F.2d 630, 644 (D.C. Cir. 1976) (The Commission does not have "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending on the regulatory goal its seeks to achieve").

[20] Petition, at 28-29.

specialized services.[21] Stand-alone broadband transmission is obviously neither. Deeming these stand-alone transmission services to be private carriage would also be inappropriate because regulation is necessary to protect the public interest and competition from Bell market power abuses.[22] As the Commission has held in the past, private carriage status is inappropriate when "the public interest requires common carrier operation of the proposed facility" -- *i.e.*, where "alternative common carrier facilities" are not available.[23]

And in all events, the Commission's own precedent imposing Title II obligations independently demands that it deny the Petition. Even if it were true that BellSouth faced *some* competition in the wholesale market for provision of last-mile broadband transport (and as shown below its claims in that regard are highly exaggerated), it does not at all follow that *all* applicable Title II regulation may be eliminated. BellSouth has asked the Commission to forbear from applying *all* Title II regulations, including sections 201 and 202 (the core provisions requiring BellSouth to provide service at just and reasonable rates and on nondiscriminatory terms and conditions) and sections 207 and 208, which establish the processes by which aggrieved parties can seek relief for violations of those duties. These core Title II obligations are so

---

[21] *See* CC Docket No. 02-33, Reply Comments of AT&T, at 26-28, filed May 3, 2002.

[22] *Cf.* CC Docket. No. 01-337 Ex Parte Letter from William Barr to Marlene Dortch, at 6, filed January 7, 2004.

[23] *Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶ 15 (1997); *Japan-US Cable Order*, 14 FCC Rcd. 13066, ¶ 39 (1999) (holding that *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) "directs us to consider whether there is any legal compulsion to serve the public indifferently. In applying this prong of the test . . . the Commission has . . . generally focused on the availability of alternative facilities").

important to sustainable competition and the public interest that the Commission has *always* applied those obligations to *all* telecommunications carriers, not simply those with market power. Thus, the mere existence of wholesale competition -- even substantial competition -- is not a lawful basis for eliminating these fundamental requirements.

In proceedings to determine whether carriers should be classified as dominant or non-dominant, the Commission has never relieved carriers lacking market power (as BellSouth now claims to be) from core Title II obligations simply because those carriers face competition.[24] To the contrary, even where the Commission has held that market competition generally could be relied on to produce cost-based and non-discriminatory rates, it has nonetheless relied on the continuing application of sections 201 and 202, as well as the Commission's complaint processes as a backstop to remedy abuses.[25] BellSouth's allegations regarding competition, therefore, even if true, cannot provide a legitimate basis to relieve BellSouth (which in all events retains market power) of its core Title II obligations. Indeed, even if the Commission were to credit BellSouth's false claims that it now faces vigorous competition in the wholesale broadband transport

[24] *See, e.g., Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 13 (1995) (granting AT&T's motion to be reclassified as a non-dominant carrier with respect to the interstate interexchange market because it lacks market power, but noting that "AT&T will still be subject to regulation under Title II," including sections 201 and 202 and the Commission's complaint process set forth in sections 206-209); *id.* ¶ 130 ("The status of AT&T as either a dominant or non-dominant carrier, therefore, does not alter its obligation to comply with" sections 201 and 202); *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 41, 65, 83, 127, 129, 131 (1999) (granting pricing flexibility to LECs subject to price caps for their interstate access charges, but noting the availability of section 208 complaints to raise claims under sections 201 and 202).

[25] *Id.*

market, any attempt to forbear would represent an arbitrary and capricious change in its policies and enforcement practices with respect to carriers that lack market power.

Preservation of existing Title II tariffing requirements is also essential in the current market circumstances. Tariffing and related regulations perform an invaluable, pro-competitive role by providing needed transparency and by reducing transaction costs -- all at very little expense to the ILECs.[26] As the Commission has correctly concluded, "incumbent LECs . . . have the incentive and ability to discriminate against competitors in the provision of advanced services."[27] Without the transparency and restrictions on price changes that the tariffing requirements provide, "[t]he provisions allowing customers and competitors to challenge rates as unreasonable or as discriminatory would not be susceptible of effective enforcement."[28] The tariffing process has alerted ISPs, CLECs and the Commission itself to ILEC attempts "to impose egregious terms" that allow for "DSL service degradation" and "rate increases for both monthly and one-time charges."[29] Not only does this process enable parties to object before changes become "set in stone," but it also "allows wholesale ISP customers to adjust their business and marketing plans in light of service changes."[30]

---

[26] *See* CC Docket No. 01-337, Comments of AT&T, at 51-57.

[27] CC Docket No. 98-141, Memorandum Opinion and Order, (rel. October 8, 1999), ("*SBC-Ameritech Merger Order*") ¶ 186.

[28] *MCI Telecoms. Corp.* v. *AT&T*, 512 U.S. 218, 230-231 (1994) (citations omitted); *see also AT&T* v. *Central Office Tel., Inc.* 524 U.S. 214, 222 (1998) (concluding that tariffs are required in order to "prevent[ ] unreasonable and discriminatory charges").

[29] *See, e.g,* CC Docket 01-337, Comments of Earthlink, at 25-26.

[30] *Id.* at 26.

In addition, tariffing with cost support (or some other mechanism that provides sufficient transparency to identify the validity of loop costs) is necessary to prevent price squeezes.[31] Without transparency, ILECs will, for example, be able to charge CLECs a greater price for the high frequency portion of the loop than the ILECs impute to their own retail xDSL service.

BellSouth further requests that the Commission forbear from applying its Part 64 accounting rules to "facilities used to provide broadband information services."[32] The Commission should decline to do so. The Commission's Joint Cost Rules require ILECs to appropriately allocate the cost of facilities used to provide both regulated and non-regulated services. The rules seek to ensure that "if there are savings to be gained from the integration of regulated and non-regulated ventures, those savings [are] shared equitably with ratepayers in order to achieve regulated service rates that are just and reasonable."[33] If the Commission grants BellSouth's request, however, the ILECs could force their basic telecommunications customers to absorb 100 percent of the cost of any facility that is used to provide both basic telecommunications and broadband information services. This plainly would have an adverse effect on competition.

Nor does the Commission's adoption of the current price cap regime obviate the need for Part 64 cost allocation. When the Commission adopted the price cap regime in 1990, it recognized that this action would not completely eliminate the ILECs' incentives

---

[31] *See, e.g.*, CC Docket 01-337, Comments of Covad, at 5-6.

[32] Petition, at 24.

[33] *Separation of Costs of Regulated Telephone Service from Non-regulated Activities*, Report and Order, 2 FCC Rcd 1298, 1304 (1987).

to allocate costs improperly. To the contrary, the Commission recognized that, even under a price cap regime, the ILECs would retain incentives to allocate joint costs improperly in order to cross-subsidize their more competitive non-regulated offerings, such as information services. Therefore, as part of its price cap regime, the Commission adopted a number of safeguards, designed to "police any LEC attempts to engage in predation or cross-subsidization."[34] Because the ILECs retain the ability and incentive to over-allocate joint costs to their regulated telecommunications operations in order to cross-subsidize their broadband information services, the Commission should retain the existing Joint Cost rules.

BellSouth also seeks elimination of numerous Title II regulations that are designed to promote public policy objectives. For example, sections 255 and 251(a)(2) impose requirements that enable persons with disabilities to have access to the telecommunications network.[35] Similarly, Commission regulations ensure the availability of 911 and E911 services to promote public safety.[36] Other regulations ensure that law enforcement officials can intercept communications when necessary for

[34] *Policy and Rules Concern Rates for Dominant Carriers,* Second Report and Order, 5 FCC Rcd 6786, 6791 (1990).

[35] Section 255 requires manufacturers of telecommunications equipment to ensure their equipment is accessible to individuals with disabilities if readily achievable, and places similar requirements on providers of telecommunications services. *See* 47 U.S.C. § 255. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, or capabilities that do not comply with the standards set forth in section 255. *See* 47 U.S.C. § 251(a)(2).

[36] *See* 47 C.F.R. § 20.18 (requiring covered carriers to provide either basic or enhanced 911 services).

law enforcement purposes.[37] BellSouth offers no justification for eliminating these requirements. These public policy objectives are "important" and cannot go unaddressed, as even other Bell companies have conceded.[38]

Finally, the elimination of all Title II regulation would also allow BellSouth to avoid universal service fund ("USF") obligations altogether. But if the Commission relieved a dominant carrier such as BellSouth of its Title II USF obligations, then the Commission could not rationally subject carriers operating in indisputably competitive markets, such as long distance, to USF surcharges. Quite simply, allowing a dominant carrier such as BellSouth to avoid USF obligations would make effective and equitable USF reform impossible.

B. There is No Basis for Any "Broadband" Exemption from the *Computer Inquiries* Nondiscrimination Obligations.

BellSouth also asks the Commission to carve out a "broadband" exemption to the existing *Computer Inquiries* obligations imposed on ILECs.[39] That claim must be rejected, because there is no difference in the technology and market characteristics of wireline broadband Internet access services that could justify the creation of a "broadband" exemption to existing *Computer Inquiries* requirements. Thus, there is no rational basis for the exemption BellSouth seeks.

The core *Computer Inquiries* nondiscrimination requirements flow from the Commission's recognition that ILECs possess monopoly control over "key inputs" that

---

[37] *See* 47 U.S.C. § 1000 *et seq*.

[38] WC Docket No. 04-29, SBC Petition, at 2.

[39] Petition, at 17-29.

non-affiliated broadband service providers need to offer information and advanced services, especially "last mile" broadband transmission facilities. As a result, the Commission correctly recognized that ILECs have both the incentive and ability to discriminate against rivals and to impede information services competition, unless they are subject to appropriate regulation.[40] As the Commission properly concluded in its *Computer II* order, "a carrier with market power and control over communications facilities essential to the provision of enhanced services could distort the competitive evolution of the enhanced services markets."[41] If an incumbent LEC could "den[y] access" to "basic transmission facilities" it could "create a bottleneck in the supply of enhanced services" that "could produce a tendency to monopoly by forcing competitors of the carrier's [ISP] affiliate to leave the market or by persuading potential entrants that the extraneous risks of participation are too great."[42] As the Commission prophetically observed, "[t]he importance of control of local facilities, as well as their location and number, cannot be overstated. As we evolve into more of an information society, the access/bottleneck nature of the telephone local loop will take on greater significance."[43]

In order to guard against the risk that carriers with "bottleneck" control over the "telephone local loop" would leverage that control into the market for enhanced services, the Commission's *Computer II* decision adopted two main regulatory mechanisms. First, the Commission recognized the need for "a mechanism whereby non-discriminatory

---

[40] *See, e.g.*, CC Docket No. 02-33, Comments of AT&T, filed May 3, 2002, at 42-46.

[41] *Computer II*, ¶ 210.

[42] *Id.*, ¶ 208.

[43] *Id.*, ¶ 219.

access can be had to basic transmission services by all enhanced service providers."[44] Accordingly, the Commission mandated that common carriers that own transmission facilities and provide enhanced services must unbundle their basic from their enhanced services and offer transmission capacity to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations."[45] Second, the Commission required the largest incumbent local carriers (the Bells and GTE) to provide their information services through affiliates that were structurally separate from the entity providing basic common carriage services.[46] The *Computer III* decision also recognized the continuing risk of market power abuse by LECs that control key transmission facilities and reaffirmed the unbundling and tariffing requirements applicable to dominant ILECs; however, it eliminated the structural separation requirements and replaced it with non-structural safeguards.[47] Moreover, the Commission reaffirmed that the core non-discrimination requirements imposed by the Computer Inquiries regime apply to all carriers, whether dominant or non-dominant,[48] just as the non-discrimination obligations of Sections 201 and 202 apply to all carriers.[49]

---

[44] *Id.* ¶ 231.

[45] *Computer II* ¶ 219.

[46] *Id*. ¶ 229.

[47] *Computer III*, ¶ 159. On appeal, the United States Court of Appeals for the Ninth Circuit held that the Commission had not supported the conclusion that nonstructural safeguards would suffice.

[48] *Computer III*, ¶¶ 100-265.

[49] *Id.*

The Commission's more recent *Computer Inquiries* orders reiterate that it is essential to continue to apply the core unbundling and nondiscrimination requirements to the incumbent LECs in order to promote vigorous information services competition. In 1999, the Commission concluded that the Bells "remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competing ISPs."[50] Just two years later, the Commission's *Enhanced Services Bundling Order* again reaffirmed the continuing need for the core *Computer Inquiries* unbundling and nondiscrimination obligations.[51] Despite the fact that the "1996 Act eliminated barriers for carriers seeking to enter" local markets, the Commission explicitly found that "incumbent LECs have market power," and that allowing them to offer information services bundled with basic transmission services without continued enforcement of the existing regulation would enable them to act "anticompetitively."[52] For this reason, the Commission expressly rested its decision to allow dominant carriers to offer retail bundles of information and basic transmission services on the continued applicability of the core *Computer Inquiries* wholesale unbundling and nondiscrimination obligations, stating:

---

[50] *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Report & Order, 14 FCC Rcd. 4289, ¶ 9 (1999) ("*BOC Enhanced Services Order*").

[51] *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report & Order, 16 FCC Rcd. 7418 (2001) ("*Enhanced Services Unbundling Order*").

[52] *Id*. ¶¶ 11, 12.

> we emphasize that we are not eliminating at this time the fundamental provisions contained in our *Computer II* and *Computer III* proceedings that facilities-based carriers continue to offer the underlying transmission service on nondiscriminatory terms, and that competitive enhanced services providers therefore continue to have access to this critical input. *Id*.

The unassailable economic and legal logic that justifies and necessitates these nondiscrimination requirements applies equally to wireline broadband access services. The reality is, as shown more fully below, that non-affiliated broadband services providers generally have no choice but to purchase the high-speed transmission building blocks for their retail broadband information services from the ILECs. Thus, if the Commission were to eliminate the ILECs' obligation to provide unbundled broadband transmission on a non-discriminatory basis, those competitive providers would be wholly at the mercy of market power-wielding ILECs that have both the incentive and ability to abuse such power -- the very anticompetitive outcome that the core *Computer Inquiries* rules were designed to prevent.

Nor is there any significant "technological" difference between broadband transmission and previous transmission technologies -- let alone one that could justify weakening the *Computer Inquiries* unbundling and nondiscrimination obligations. Market power is an economic fact that flows from the ILECs' control over loops and other high-speed transmission facilities that non-affiliated broadband providers need to compete; it does not depend on the types of technologies that an ILEC happens to deploy on those transmission facilities. In this regard, it is the sheerest historical revisionism for the BellSouth to assert[53] that the *Computer Inquiries* rules addressed only the use of

[53] Petition, at 7-8.

"narrowband" technologies to access analog lines to reach voice mail, and that the *Computer Inquiries* rules are inapposite to the last-mile broadband transmission services at issue here. The Commission's First and Second *Computer Inquiries* were in fact initiated to address services that allowed customers to use remote computer terminals to access centrally-located main frame and other computers over digital transmission lines, which were precursors of today's Internet access and other similarly-constituted information services. Although today's electronics allow higher-speed transmission than was generally available in 1980, there is no relevant difference between broadband transmission and other types of technologies (such as T1) that have been used for decades to provide high-bandwidth transmission over copper loops and other media. There is thus no rational basis for creating a "broadband wireline Internet access services" exception to the core *Computer Inquiries* nondiscrimination obligations.

III. BELLSOUTH HAS NOT REMOTELY SATISFIED THE REQUIREMENTS FOR FORBEARANCE UNDER SECTION 10

As a threshold matter, BellSouth's Petition is patently insufficient, and applicable law requires that it be denied on its face. Therefore, the Commission need not even examine any of the specific requirements of Section 10(a)[54] before rejecting the Petition.

Under Section 10(a), the proponent of forbearance must make three "conjunctive" showings, and the Commission *must* "deny a petition for forbearance if it finds that *any one* of the three prongs is unsatisfied."[55] First, the proponent must show that enforcement of the identified regulations to the specific services at issue "is not necessary to ensure

[54] 47 U.S.C. § 160(a).

[55] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (emphasis added).

that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory."[56] Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."[57] Third, it must show that non-enforcement of those regulations "is consistent with the public interest"[58] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[59]

However, because these criteria focus on the protection of competition and consumers, both the courts and the Commission have recognized that the Commission must examine *detailed empirical evidence* concerning *specific market conditions* that apply to the particular regulations and services at issue. Indeed, the courts have held that forbearance of dominant carrier regulation under Section 10 demands "a painstaking analysis of market conditions" supported by empirical evidence.[60] Critically, this market analysis is *required*; the Commission may not simply assume, as BellSouth would have it do, that in the absence of the identified regulations "market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[61] Thus, before the Commission may grant a forbearance request, it must review specific market data -- and conclude based on *those* data -- that if

---

[56] 47 U.S.C. § 160(a)(1).

[57] *Id.* § 160(a)(2).

[58] *Id.* § 160(a)(3).

[59] *Id.* § 160(b).

[60] *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp.* v. *FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

[61] *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, Report and Order, Fifth Memorandum Opinion and Order, 14 FCC Rcd. 11443, ¶ 32 (1999).

it forbears from enforcing a regulation the conditions of Section 10(a) will be met, *i.e.*, that (i) the charges for the applicable services will be just, reasonable, and non-discriminatory in the specific market; (ii) consumers in the specific market will be protected, and (iii) deregulation will be consistent with the public interest and will promote competition in the specific market.

The Petition, however, is fatally deficient in this regard, because it fails to provide the evidence required for the Commission to make the mandatory market analysis. Indeed, any such analysis -- on any of the three Section 10(a) criteria -- is impossible on the record BellSouth has presented. As a result, the Commission must reject the Petition out of hand for failure to provide the factual predicate necessary for a forbearance decision.

First, the Petition fails to meaningfully define the geographic markets where BellSouth seeks relief, and it provides no data that could be relevant to such geographic markets. While the Petition provides reams of data relating to what BellSouth alleges are the retail "market shares" of various broadband service providers, including ILECs, cable companies, and others,[62] in the end, BellSouth offers only hodge-podge of economically meaningless and irrelevant "national share" data for broadband service providers. Such data are meaningless here for two independent reasons. As an initial matter, national figures provide an insufficient basis for the Commission's analysis because the broadband services markets at issue are undeniably *local*, a fact that other Bells -- and

[62] *Petition, at 7-13.*

even BellSouth itself -- have conceded.[63] In the absence of detailed empirical data about the relevant local geographic markets, the Commission simply cannot conduct the inquiry required by law, and thus cannot possibly grant the relief requested by the Petition.[64] And even more important, these data refer only to the national *retail* market, not to the *wholesale* market, which is the subject of the regulatory rules and requirements from which BellSouth seeks forbearance. Without evidence regarding the relevant wholesale market, there is simply no way for the Commission to make the required factual findings.

Second, the Petition makes no attempt to meaningfully define the services for which BellSouth seeks forbearance relief. Indeed, other than making a wholly perfunctory reference to digital subscriber line ("DSL") services, the Petition does not specifically identify *any* of the services to which the requested forbearance relief would apply.[65] Indeed, the Petition chooses not to focus on specific services at all, or even on specific facilities, but instead attempts to define the "broadband" relief sought as applying to "any *technologies* that are capable of providing 200 kbps in both directions."[66] To call such a definition -- which would encompass a virtually unlimited array of services -- exceedingly broad is a huge understatement. Given this definition, the Commission simply cannot fulfill its mandatory duty to consider *specific* market

---

[63] *See, e.g.*, WC Docket No. 04-242, Petition, Att. Memorandum of Points and Authorities, at 16, 19, 21 *(Reply Comments of BellSouth, Harris Dec. ¶ 6, CC Docket No. 01-337 (filed Apr. 22, 2002).*

[64] "National" data are also irrelevant to BellSouth's specific request for forbearance relief because they necessarily incorporate information on out-of-region markets where BellSouth is not even a monopoly provider of last-mile broadband facilities.

[65] *See* Petition, at 1, n.2.

[66] *Id*. (emphasis added).

conditions with respect to *specific* services. Nor should (or can) the Commission attempt to do so, because the heavy burdens of definition and persuasion imposed by the forbearance request fall upon BellSouth alone. And BellSouth has clearly failed to sustain that burden at the most fundamental, threshold level.

Indeed, the potentially breathtaking scope and inherent vagueness of the relief requested by the Petition reveal its true purposes: to rush this Commission into making legal rulings that BellSouth will argue bind the Commission in other ongoing proceedings concerning broadband services and applications[67] and to obtain virtually unlimited regulatory relief for an extremely broad and ever-growing category of services that BellSouth will seek to define on an ongoing, *ad hoc* basis.[68] The Commission should reject BellSouth's transparent ploy and summarily reject the Petition for its facial failure to satisfy mandatory statutory criteria.

But even if the Commission chooses to consider the Petition on the merits, it must reject the Petition on that basis as well. Section 10(a) requires the Commission to "deny a petition for forbearance if it finds that any one of the three prongs [of the statutory

---

[67] *See*, e.g, WC Docket No. 04-29, Petition of SBC (seeking forbearance from all Title II regulation of "IP Platform" services).

[68] BellSouth's request for forbearance here is particularly unseemly. BellSouth argued in this Commission's *Triennial Review Remand* ("*TR Remand*") proceeding that unbundling of high-capacity facilities was unnecessary because such facilities were available to competitors through special access services subject to Title II of the Communications Act. WC Docket No. 04-313, Comments of BellSouth at 36; *id*., Reply Comments of BellSouth at 45-58. Here, BellSouth seeks to remove from the protections of Title II the very special access services on which it previously relied. Such unabashed gamesmanship only portends BellSouth's future conduct with respect to broadband services if the Petition were granted.

forbearance test] is unsatisfied."[69] BellSouth's Petition fails to satisfy any of those requirements.

A. The Petition Does Not Meet the Requirements of Section 10(a)(1)

Section 10(a)(1) requires BellSouth to demonstrate that enforcement of the *Computer Inquiries* and Title II regulations are not necessary to ensure just, reasonable, and non-discriminatory rates, terms, and conditions for access to last-mile wholesale broadband facilities. However, BellSouth does not even make a serious attempt to prove the existence of meaningful wholesale competition. Nor could it do so.

Despite BellSouth's attempts to confuse the record with a deluge of data pertaining to irrelevant geographic and service markets (*e.g.*, "national" data relating to retail markets), it is critical that the Commission recognize that the continuing need for the core *Computer Inquiries* rules does not at all turn on the existence or level of *retail* competition; rather, it turns exclusively on the continuing lack of *wholesale* alternatives available to non-affiliated broadband providers. Although there has recently been some competition in the provision of retail Internet access services, the Commission has consistently recognized that retail competition may exist only *because* of the *Computer Inquiries* rules and the competitive opportunities that they create. Thus, in its rejection of the Bells' claims that developments since *Computer II* and *Computer III*, such as "the effect of the 1996 Act," had "rendered the CEI plans superfluous,"[70] the Commission stressed that "although many ISPs compete against one another, *each ISP must obtain the underlying basic service from the incumbent local exchange carrier, often still a BOC,* to

[69] *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

[70] *BOC Enhanced Services Order* ¶ 11.

reach its customers."[71] BellSouth has not offered a shred of evidence showing the existence of a widespread wholesale market for the "underlying basic service[s]" that competitors need to provide their retail services.

And in fact the evidence is totally to the contrary. In the vast majority of cases, independent ISPs and other enhanced service providers simply do not have any way of providing broadband services without access to incumbent LEC last-mile facilities, because they rarely have access to competitive alternatives. Regardless of any retail services they may offer, cable providers do not provide adequate wholesale broadband access alternatives to constrain the incumbent LECs' market power over inputs needed by non-affiliated broadband providers.

In fact, only a small proportion of businesses receive retail service from cable providers, and retail cable modem services are not even ubiquitously available to residential customers. And BellSouth's claims that cable modem service offers a viable alternative in the wholesale market for last-mile broadband transmission for businesses are greatly exaggerated and fundamentally incorrect.[72] As explained by Cbeyond Communications, LLC ("Cbeyond"), traditional cable modem service is not a viable alternative for the majority of broadband needs of most business customers.[73] Cable modem service is generally unsuitable for sophisticated broadband business needs because such service is provided via asymmetrical, relatively low-bandwidth Hybrid

---

[71] *Id.* ¶ 16 (emphasis added).

[72] Petition, at 8-10.

[73] See WC Docket No. 04-313, CC Docket No. 01-338, Ex Parte Letter (the "Cbeyond Ex Parte") from Thomas Jones, Cbeyond, to Marlene H. Dortch, Secretary, Federal Communications Commission, filed November 19, 2004, at 1.

Fiber Coaxial ("HFC") facilities that have inherently limited upstream capacity, and that do not provide the reliability, security, and service quality that businesses demand.[74] Moreover, to the extent that cable companies may try to provide more sophisticated, higher-bandwidth cable modem services for businesses through use of fiber transmission facilities, cable companies are just as dependent on ILEC last-mile broadband transmission facilities as any CLEC, ISP, or other potential broadband competitor.[75]

And even where retail cable modem services are available, they are still not a replacement for the wholesale access that non-affiliated broadband providers need to reach end users. Independent providers are just beginning to explore alternative wholesale broadband access arrangements from cable companies. While some progress has been made in developing solutions that would allow multiple ISP access over cable networks -- which were not engineered for, and are not compatible with, the telephone network common carrier model[76] -- the reality today is that multiple ISP access over

---

[74] *Id.,* at 2-3.

[75] *Id*. The Commission's decision the 271 Forbearance proceeding is not to the contrary. *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), Memorandum and Order, WC Dkts. Nos. 01-338 et al. (rel. October 27, 2004) (the "*271 Forbearance Order*"). There, the Commission lifted some requirements for access to ILEC broadband elements used to serve business customers under section 271 of the Telecommunications Act, but did so only because access to network elements used to serve business customers *would still be available* under section 251 of the Act. *271 Forbearance Order*, at n.68. In contrast, if the Petition were granted, BellSouth would claim an unfettered right to deny competitors access to last-mile broadband transmission facilities, or the right to offer any service it did choose to provide on any rates, terms and conditions it elected.

[76] *See* GN Docket No. 00-185, Comments of AT&T at 49-66; *Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee,* Applications & Public Interest Statement,

(footnoted continued on next page)

cable remains in its infancy, and it is available only in very limited areas and under terms and conditions that cable companies and ISPs recognize may need to change significantly, given the technical uncertainties and lack of experience with such arrangements. Thus, non-affiliated broadband providers that wish to serve businesses and many residential customers do not even have a *prospect* of a significant cable-based alternative to the ILECs' wireline wholesale services.

But even if there were substantial wholesale competition from cable providers (which there is not), the existence of cable companies as possible wholesale suppliers would show, at best, a *potential* duopoly in the relevant geographic market, which the courts and the Commission hove routinely found is insufficient to promote vigorous competition. Economic theory and Commission precedent teach that strong anticompetitive incentives are not overcome by mere duopoly competition.[77] In this regard, it does not matter whether a cable company or an ILEC has a higher market share in given local market; duopoly "competition" remains problematic because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels, rather than attempting ruthlessly to compete with each other, as they

---

(footnote continued from previous page)

at 5, 92-95 (filed Feb. 28, 2002).

[77] *See EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("[E]xisting antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."); *id.*, Statement of Chairmen Powell ("At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."). *Accord FTC* v. *H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001).

would need to do in a market with multiple firms.[78] For this reason, the Commission held in the *EchoStar Merger Order* that "existing anititrust doctrine suggests that a merger to duopoly…faces *a strong presumption of illegality*."[79] Similarly, Supreme Court precedent establishes that duopolies presumptively violate antitrust standards and cannot meet the objectives of the Telecommunications Act, which include the promotion of broad competition.[80]

Nor can BellSouth rely on other forms of intermodal competition to support its forbearance requests. Despite the hype, non-affiliated broadband providers also cannot turn to the owners of satellite or wireless broadband facilities for alternative sources of supply.[81] Broadband wireless services are today available in only very limited areas, and even leading carriers that attempted to deploy fixed wireless have described their efforts as "failures."[82] And the large satellite providers have had so little broadband success that

---

[78] *See* United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

[79] 17 FCC Rcd 20559, ¶103 (2002) (emphasis added).

[80] *Verizon Communications, Inc*. v. *Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 880-82 (2004).

[81] *See, e.g.*, Andy Pasztor, *EchoStar Will No Longer Offer Web Via Satellite*, The Wall Street Journal, at B5 (Apr. 5, 2002) (addressing EchoStar's shift from satellite-based broadband service to DSL-based broadband service); Jim Barthold, *Restarting Fixed Wireless: We Are Still Waiting*, Telephony (Feb. 11, 2002) (addressing Sprint and WorldCom fixed wireless service rollbacks) ("*Barthold Telephony*").

[82] *See,* e.*g.*, Loop and Transport CLEC Coalition Comments, WC Docket No. 04-313, filed October 4, 2004, Declaration of Wil Tirado at 11-13 (XO, which invested over $1 billion in acquiring LDMS spectrum, attempted to deploy fixed wireless loops in about 30 markets but "[d]espite our best efforts, it was a failure"; also citing market failures of Teligent and Winstar); *see also*, *Barthold Telephony* (noting that Sprint and WorldCom were rolling back their service).

both have found it necessary to partner with the Bells.[83] Moreover, the fact that DIRECTV itself needs to purchase wholesale DSL from the ILECs[84] confirms that satellite broadband cannot be relied upon to constrain RBOC market power, especially in the wholesale market.[85] Moreover, neither satellite nor wireless providers generally offer unbundled broadband transmission services to independent ISPs.

Similarly, non-affiliated broadband service providers also cannot realistically turn to competitive wholesale carriers that have self-deployed their own facilities. As explained in considerable detail in other Commission dockets, competitive deployment of alternative transmission facilities, particularly local loops, is extremely limited and the Bells have used their monopoly control of last-mile facilities to squelch potential competition in the market for wholesale special access facilities.[86] Although a few competitive data LECs continue to weather Bell discrimination, the reality is that these competitive carriers are themselves almost entirely dependent upon incumbent LEC

---

[83] *See* Margaret Kane, *SBC Connects With DSL Subscribers*, CNET News.com (Apr. 18, 2002) (discussing EchoStar partnership with SBC); DIRECTV Broadband, Inc., ILEC Broadband Dominance Comments, CC Docket No. 01-337, at 1-2 (filed Mar 1, 2002) ("DIRECTV Broadband provides service by means of its own nationwide broadband network combined with last-mile wholesale xDSL connectivity and transport . . . purchased from ILECs, including BellSouth, SBC, Qwest and Verizon, and, where possible, from CLECs. . . ."); DIRECTV Broadband, Inc., ILEC Broadband Dominance Reply Comments, CC Docket No. 01-337, at 1 ("[T]he ILECs remain completely dominant as suppliers to most broadband services providers, including DIRECTV Broadband").

[84] *See* CC Docket No. 01-337, Comments of DIRECTV at 2, 7.

[85] *See* GN Docket No. 04-54, Comments of EchoStar Satellite LLC at 9 ("technologies such as fixed wireless and satellite, combined, make up less than one percent of broadband service lines.")

[86] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Petition for Rulemaking, RM-10593, filed October 15, 2002.

facilities. And, in all events, they collectively provide less than 7 percent of DSL service arrangements today, virtually all of which are for services provided to businesses.[87] And there are few or no competitive wholesale carriers deploying any significant number of last mile loops to residences other than multiple dwelling units. Thus, except in rare instances, non-affiliated broadband providers cannot turn to competitive LECs to reach customers.

For all these reasons, non-affiliated broadband providers remain critically dependent upon incumbent LECs and their last-mile high-speed transmission facilities to provide high-speed Internet access.[88] This, in turn, requires continued enforcement of the *Computer Inquiries* rules.

Despite these overwhelming facts, BellSouth attempts to confuse the issue of its undeniable monopoly control by proffering data that it claims shows vibrant competition for *retail* market broadband access services.[89] These retail data are utterly irrelevant to

---

[87] *See* e.g., WC Docket No. 04-313, Comments of AT&T at 153-65; *id.*, Ex Parte Letter from C. Frederick Beckner, filed November 12, 2004; *Third Section 706 Report*, 17 FCC Rcd 2844, ¶ 51 & App. C.

[88] Comments in the *Computer III Refreshening Proceeding* included comments filed in response to the Commission's Public Notice of March 7, 2001, DA 01-620 in CC Docket No. 95-20, seeking to update and refresh the record on *Computer III* requirements. *See, e.g.*, EarthLink *Computer III Refreshening* Comments at 7 ("Simply put, all ISPs, and especially ISPs such as EarthLink serving all consumers regardless of where they live or work, continue to be reliant on ILEC services, including for DSL."); ITAA *Computer III Refreshening* Comments at 7 ("At the present time, ISPs continue to be almost totally dependent on the BOCs for the telecommunications transport services they need to deliver services to their customers."); Texas Internet Service Providers Assoc. *Computer III Refreshening* Comments at 3-4. ("ISPs cannot avoid, at least for the foreseeable future, being dependent on SBC or one of its subsidiaries, at least in part. . . . SBC can quite literally bankrupt an ISP in a matter of days in any number of ways.").

[89] Petition, at 7-13.

the *Computer Inquiries* rules, which impose obligations on telecommunications providers that are only applicable to the *wholesale* market. The full range of empirical data also shows that BellSouth's claims about retail competition are wildly exaggerated. Indeed, the data show that ILECs have used to their monopoly control of last-mile broadband access facilities to artificially constrain competition and harm competitors and competition in both the retail markets for large business (*i.e.*, enterprise) and mass-market (*i.e.*, residential and very small business) customers.

- **Broadband Services for Large Business Customers**

The ILECs possess, and will continue to possess, market power in the provision of information and broadband data services to large retail business customers.[90] Control over bottleneck special access facilities enables ILECs to leverage their power into the provision of retail data services, and they have proven only too willing to use that leverage to increase their special access rates to levels that make it virtually impossible for rival carriers to compete,[91] and to hamper rivals with poor quality interconnections and unnecessary delays.[92] The ILECs' own large business retail customers confirm that ILECs have abused their control over bottleneck special access inputs to drive potential

[90] *See* CC Docket No. 01-337, Comments of AT&T, at 19-35; Ad Hoc at 10-21; Competitive Telecommunications Association at 15-19; Time Warner at 5-10; WorldCom at 22-25; NYPSC at 1-2 ("ILECs still possess market power over the platform needed to provide telephone broadband services.").

[91] *See , e.g.,* WC Docket No. 04-313, Comments of AT&T, at 100 & Benway *et al*. Declaration ¶¶ 78-103); *id*., Reply Comments of AT&T at 65-68; CC Docket No. 01-337, Comments of AT&T, at 31-33, filed April 22, 2002. Ad Hoc at 11-13; WorldCom at 25.

[92] *Se, e.g.*, WC Docket No 04-313, Comments of AT&T at 109-113 & Benway et. al Declaration ¶¶ 46-52; *id*., Ex Parte Letter from C. Frederick Beckner, representing AT&T, dated November 18, 2004; CC Docket No. 01-337, Comments of AT&T, at 34-36, filed April 22, 2002; WorldCom at 18-19.

competitors out of the business.[93] And even studies cited by ILECs regarding the market for broadband special access facilities conclude that "[t]he RBOCs will continue to dominate."[94]

Similarly, state commissions have in the past confirmed ILEC dominance in the provision of special access data services.[95] And, as described above, this Commission has even more recent evidence that the ILECs will discriminate in the provision of wholesale telecommunications services to firms that compete against them in "downstream" markets. Just this month, the Commission concluded that BellSouth itself had engaged in unlawful discrimination in the provision of special access service -- an essential input for long distance service provided to enterprise customers -- by offering greater discounts to BellSouth's long-distance affiliate than to BellSouth's non-affiliated long-distance competitors.[96]

Moreover, the ILECs have consistently used their market power to manipulate pricing to foreclose competition in the retail market for special access data services

---

[93] *See* CC Docket No. 01-337, Comments of Ad Hoc at 14 (stating that its members have "no competitive alternatives to ILEC services to meet their broadband business services requirements in the overwhelming majority of their service locations").

[94] *See* IDC, U.S. Packet/Cell-Based Services Market Forecast and Analysis, 2000-2005, at 28, 34-35 (2001).

[95] *See, e.g., UNE Remand Order* ¶ 182; *see also id.* ¶ 321 ("[S]elf-provisioned transport, or transport from non-incumbent LEC sources, is not sufficiently available as a practical, economic and operational matter."). *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc., Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, NY PSC Case 00-C-2051, at 6 (June 15, 2001) ("*NYPSC June Special Services Order*").

[96] *See AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (Dec. 9, 2004).

offered to large business customers through the imposition of price squeezes. There are numerous services for which the ILEC special access charges that AT&T incurs are higher than the *retail* price that the ILEC is charging customers directly for its intraLATA service.[97] In the face of such evidence, any ILEC claim that a price squeeze could never occur is simply not credible. Moreover, the ILECs' special access pricing in general does not remotely resemble what would be found in a competitive market.[98] In fact, the ILECs' special access prices have *risen* in those areas where ILECs received pricing flexibility – just the opposite of what would happen if there were true competition.[99]

The ILECs' non-price discrimination is also well documented[100] and further confirms that the ILECs are exploiting their special access bottlenecks to gain market power in the provision of data services to large businesses. Given the ILECs' continuing pattern of anti-competitive activities, BellSouth's suggestion that it would maintain an "open network" in *any* downstream broadband market in the absence of regulation -- and any viable alternatives -- is nothing short of absurd.

---

[97] *See* WC Docket No. 04-313, Comments of AT&T at 100 & Benway *et al*. Declaration ¶¶ 78-103; CC Docket No. 01-337, Comments of AT&T, at 32-33,; Benway Decl. ¶ 13.

[98] *See* WC Docket No. 04-313, Comments of AT&T at 100 & Benway *et al*. Declaration ¶¶ 78-103; CC Docket No. 01-337, Comments of Ad Hoc, at 11,.

[99] *See, e.g*., WC Docket No. 04-313, Comments of AT&T at 103-08 & Stith Declaration; *id*; Reply Comments of AT&T at 82-87 & Stith Declaration & Selwyn Reply Declaration ¶¶ 47-74; *id*. Ex Parte Letter from C. Frederick Beckner, representing AT&T, filed December 7, 2004.

[100] *See, e.g.*, WC Docket No 04-313, Comments of AT&T at 109-113 & Benway et. al Declaration ¶¶ 46-52; *id*., Ex Parte Letter from C. Frederick Beckner, representing AT&T, dated November 18, 2004; CC Docket No. 01-337, Comments of AT&T, at 34-36, filed May 22, 2002 (describing poor quality, delays, and other discrimination in favor of the ILECs, their affiliates and their retail customers); WorldCom at 18-19 (explaining that SBC has restricted the availability of unbundled loops and transport and has failed to provide such facilities in a timely manner).

- **Broadband Services for Mass Market Customers**

The ILECs' market power at the wholesale level with respect broadband transmission services translates into market power at the retail level for mass-market (*i.e.*, residential and small business) customers as well. As a preliminary matter, and as explained above, BellSouth's data are not only directed at the wrong market level (retail versus wholesale), but also at the wrong geographic market (national versus local). And in all events, BellSouth's claims about the retail markets are wildly overstated. There is almost no intermodal competition in the provision of retail broadband services to small businesses.[101] In the consumer retail market, BellSouth would have the Commission believe that cable and DSL compete head-to-head throughout the entire nation without exception. But many residential customers do not even have access to cable modem Internet access services.[102] BellSouth also asks the Commission to believe that satellite and wireless services will check ILEC dominance. The reality is that these alternative providers are not viewed today by consumers as serious alternatives to the Bells' DSL

[101] *See, e.g.*, WC Docket No. 04-313, Comments of AT&T, Selwyn Declaration ¶¶ 113-15; *id.*, Reply Comments of AT&T, Selwyn Reply declaration ¶¶ 92-93; *id.*, Ex Parte Letter from Joan Marsh, AT&T, dated November 30, 2004, Attachment at 5-7; CC Docket No. 01-337, Comments of AT&T, at 40-41 & Willig Declaration ¶ 20; Public Service Commission of Wisconsin at 4 ("DSL dominates the small business portion of the mass market."); Covad at 15 ("Cable modems, satellites and fixed wireless are not available substitutes for these businesses."); ALTS at 6 ("There is no inter-modal alternative to the ILEC's services . . . ."); IP Communications Corporation at 3 ("[C]able is not a substitute" for "a business that generally does not have cable access."); WorldCom at 12 ("[C]able-based high-speed Internet access is rarely available to small business customers because cable plant generally is restricted to residential neighborhoods.").

[102] *See, e.g.*, WC Docket Nos. 01-338, 96-98, 02-33, 98-147, Ex Parte Letter from David Lawson, AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, filed May 26, 2004; WC Docket Nos. 04-36, 04-29, Reply Comments of AT&T, at 38, filed July 14, 2004.

service. Combined, these platforms have a *de minimis* share of broadband services that are *declining*.[103] According to the FCC's own statistics, satellite/fixed wireless providers have seen their share of "high-speed" lines *decline* from 2.8% in 1999 to 1.3% in 2003,[104] and their share of "advanced service" lines decrease from 0.7% in 1999 to 0.3% to 2003.[105] Broadband over power line access (known as "BPL") does not even have a measurable share.[106] And given the acknowledged failure of fixed wireless applications as described above, these options are currently inadequate to constrain RBOC market power. The prospects for the future of satellite broadband access are so dim that the most positive thing that BellSouth can say about the service is that one of the two leading providers recently managed to emerge from bankruptcy.[107]

In sum, continued enforcement of the existing *Computer Inquiries* regulations are a necessary means to ensure just, reasonable, and non-discriminatory rates, terms, and conditions for access to last-mile wholesale broadband facilities. Thus, even if the Commission chooses to consider the Petition on the merits, it must reject BellSouth's extraordinary request.

---

[103] *See, e.g., High Speed Services for Internet Access: Status as of December 31, 2003,* FCC Industry Analyst and Technology Division, Tables 1 - 4 (rel. June 2004).

[104] *Id.*, Chart 6.

[105] *Id.*, Chart 7.

[106] Independent analyst estimates corroborate the Commission's figures. Gartner, Inc., *U.S. Consumer Broadband Keeps Growing: Online Households Remain Steady* (Jan. 2, 2004), at 7 (in 2003 broadband modalities other than DSL and cable altogether accounted for only 4% to 6% of the market share.); Stat/MDR, *Reaching Critical Mass: The US Broadband Market* (Mar. 2004), at 19 (estimating satellite broadband subscribers to be 310,000 at the end of 2003).

[107] Petition, at 12 & n.43.

B. The Petition Does Not Meet the Requirements of Sections 10(a)(2) and 10(a)(3)

BellSouth has failed to comply with Sections 10(a)(2) and (3), which require it to demonstrate that enforcement of Title II obligations and the *Computer Inquiries* requirements are not necessary to protect consumers and that forbearance would promote the public interest by promoting competition.[108] But, it is obvious that only continued enforcement of Title II obligations and the *Computer Inquiries* requirements will protect consumers and promote competition, by ensuring that BellSouth cannot discriminate against non-affiliated broadband providers, so that consumers may access broadband services, content, and capabilities based on *their* preferences, not the ILEC's. As shown above, ILECs such as BellSouth possess monopoly control over "key inputs" that non-affiliated broadband providers need to offer information and advanced services, and they have both the incentive and ability to discriminate against rivals and to impede competition, unless they are subject to appropriate regulation. Indeed, as shown in Section II, *supra*, continued enforcement of Title II and *Computer Inquiries* non-discrimination obligations is absolutely essential to enable vigorous competition for information and broadband services and application.

Moreover, a review of BellSouth's argument on these points only confirms this conclusion. BellSouth's primary argument is that continued enforcement of these regulations is neither necessary to protect consumers nor in the public interest because compliance is far too

[108] *See* Section 10(b).

costly.[109] Aside from the fact that BellSouth's cost argument is foreclosed by applicable law, it is also a much-ado-about-nothing claim that is wholly unsupported by the record evidence.

BellSouth asserts that *Computer Inquiries* rules impose $50 million in additional costs, but it offers only vague and unsupportable assertions to buttress that claim. In fact, the detail BellSouth does provide belies its claims. BellSouth asserts[110] that most of the extra costs it complains about are the result of "redundant" regulatory and non-regulatory personnel needed to comply with the subject rules. But BellSouth ignores that the *Computer Inquiries* rules do *not* require it to maintain a separate affiliate. Although BellSouth is correct that the *Computer Inquiries* rules (as well as Title II) require that it act in a nondiscriminatory manner, those requirements do not forbid it to use the *same* staff to support the operations of *both* its core and affiliate entities. Indeed, the Commission's in *Computer III* Order *eliminated* the structural separation requirement.[111] Thus, BellSouth's claim that the *Computer Inquiries* rules cause it to incur significant costs for redundant, structurally separate operations simply cannot be credited.

Moreover, BellSouth's claim[112] that the current rules require it to maintain redundant networks is technologically bankrupt. BellSouth conjures up false images of the need to construct redundant physical networks. But as AT&T has already demonstrated, in a modern packetized network, *both* basic transmission capabilities *and* enhanced or information services capabilities can be provided on the *same* transmission

---

[109] Petition, at 21-29.

[110] *See* Petition, Fogel Decl., at 5-8.

[111] *See* WC Docket Nos. 01-337, *et al*; AT&T Ex Parte Letter from David Lawson to Marlene Dortch, filed August 14, 2004, at 5.

[112] *See* Petition, Fogel Decl., at 5-8..

facility at the network operator's choice, based on nothing more than software changes that can be implemented using a router line card and a dedicated port.[113] Indeed, the introduction of packet-based technology makes it significantly easier to re-configure network facilities than older technologies. Thus, there is simply no need for an ILEC to construct a "parallel" physical network to fulfill the *Computer Inquiries* requirements. The existing packet network, which is available at no incremental cost, already enables BellSouth to meet those requirements.

BellSouth also claims that the *Computer Inquiries* rules delayed its ability to offer Regional Broadband Aggregation Network ("RBAN") to ISPs.[114] BellSouth describes RBAN as a means of providing small ISPs with access to broadband transmission. It claims that because RBAN utilizes protocol conversion, it is an information service and that its ability to offer RBAN was delayed because it also needed to offer the underlying transmission service on a standalone basis to any ISPs that might want it. But BellSouth fails to demonstrate any significant competitive harm from the so-called "regulatory delay." To the contrary, BellSouth admits that it *was* able to develop the necessary transmission services within a few months of the time it launched the new product. And while BellSouth suggests that this put it at some kind of disadvantage with cable,[115] that claim makes no sense. Cable companies generally do not offer wholesale broadband access, so no competition is involved.

---

[113] *See, e.g.*, WC Docket, No. 02-33 *et al.*, Ex Parte Letter from David Lawson to Marlene Dortch, FCC, filed July 31, 2003.

[114] Petition, at 22.

[115] Petition, at 23.

In all events, BellSouth's complaint regarding costs is extremely narrow and does not call for the radical remedy it proposes. RBAN is *not* a retail product; rather, it is a wholesale offering that was developed for ISPs. BellSouth's argument appears to be that if it develops a means of providing ISPs with wholesale access to its network that is an information service, it is also required to offer the basic transmission functions underlying that wholesale offering even if there appears to be little demand for the underlying basic transmission service. But to the extent that such a situation might actually arise, the solution is *not* the one BellSouth requests (*i.e.*, the complete elimination of the core *Computer Inquiries* non-discrimination requirements). Any such "problem" can properly be addressed through the ordinary waiver process, *e.g.*, a request for a waiver, under which a Bell would not have to do the work necessary to provide the basic standalone transmission until a reasonable time after it receives a bona fide request to provide it.

Next, BellSouth claims that Part 64 cost allocation rules designed to prevent and detect discrimination are unnecessary.[116] But BellSouth provides no evidence that these rules impose substantial additional costs. And critically, Part 64 is intended to do more than merely prevent cross-subsidization, as BellSouth claims. Appropriate cost allocation is also required to ensure that the BellSouth is not undertaking a price squeeze. The ILECs' documented abuse of price squeeze in for local broadband data services[117] requires that Part 64 rules continue to be enforced.

---

[116] *Id.*

[117] *See* WC Docket No. 04-313, Comments of AT&T at 100 & Benway *et al.* Declaration ¶¶ 78-103; CC Docket No. 01-337, Comments of AT&T, at 32-33 & Benway

(footnoted continued on next page)

BellSouth also asserts that *Computer Inquiries* rules prevent it from developing "tailored" information service offerings to ISPs.[118] That is nonsense. The prohibitions against discrimination do not preclude BellSouth from making "customized" deals. Contract tariffs are available for just such purposes.[119] Indeed, BellSouth *admits* that the Commission provides "flexibility for LECs to design customized arrangements," but it simply asserts without explanation that aspects of the *Computer Inquiries* regime undermine that flexibility.[120] Notably, however, BellSouth fails to cite any rules that purportedly prevent it from offering customized deals such as contract tariffs. Moreover, to the extent any such rules did exist, the answer would not be to scrap the core *Computer Inquiries* non-discrimination obligations, but rather to modify the Commission's rules so that BellSouth could offer contract tariffs.

Recognizing that its meager cost showing is insufficient to warrant any relief, BellSouth attempts to suggest that the Commission may somehow balance the costs of regulation against supposedly enhanced incentives for ILEC broadband investment as part of Section 10 analysis. But the plain language of Section 10(a) bars the Commission from balancing the *certain* competitive harms that would occur from deregulating a dominant company with market power that controls essential access facilities, such as BellSouth, against the speculation that such deregulation might increase investment

---

(footnote continued from previous page)

Declaration. ¶ 13.

[118] Petition, Fogel Decl., at 2-5.

[119] *See* WC Docket Nos. 01-337, *et al.*, Ex Parte Letter from David Lawson, representing AT&T, filed August 14, 2004, at 8.

[120] *See id*.

incentives. As explained above, Section 10(a) requires three *conjunctive* showings, and the first two, i.e., that enforcement of the regulation at issue is not necessary to ensure just and reasonable rates and conditions and that enforcement is not necessary to protect consumers, are *absolute* and do not permit balancing.[121] Thus, even if the third showing -- that forbearance is consistent with the "public interest"[122] -- permitted consideration of investment incentives, the Commission cannot grant forbearance unless *all three* conditions of Section 10(a) are satisfied, which it clearly cannot do here. Nor does Section 706 alter this analysis. As the Bells themselves have acknowledged, section 706 is not "an *independent* source of forbearance authority."[123] Thus, even if section 706 could be considered under Section 10(a)(3)'s public interest analysis, section 706 plainly does *not* authorize the Commission to rewrite section 10(a) to allow a trade-off of irrefutable anticompetitive risks that result from the existence of ILEC market power against possible ILEC investment incentives.[124]

---

[121] 47 U.S.C. § 160(a)(1), (2).

[122] *Id.* § 160(a)(3).

[123] *See* WC Docket No. 04-29, Petition of SBC, at 11-12 (emphasis in original); *see Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 176 (2003) (section 706 grants the Commission no "independent" authority) (citing precedents).

[124] Nor has BellSouth remotely justified its claim that the public interest in "regulatory parity" requires the relief requested in the Petition. As the Commission recognized in the *Wireline Broadband NPRM*, regulatory parity demands no more than a "consistent *analytical framework*" across platforms in determining what regulations are appropriate. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, ¶ 7 (2002) (emphasis added). And the Commission always has applied a consistent analytical framework across wireline, cable, wireless and satellite broadband platforms: it regulates broadband facilities and services only where needed to protect consumers and competition from abuses of market power. And as the Commission also recognized, "a consistent analytical framework may not lead to identical regulatory requirements across platforms.

(footnoted continued on next page)

Moreover, the Petition does not fairly and accurately frame all of the issues that must be addressed when, in an appropriate context and proceeding, the Commission considers incentives for future broadband investment. Any reasoned analysis of investment incentives must consider how unbundling obligations impact the investment incentives of *all* the relevant market participants for *all* the facilities necessary to provide broadband services. Broadband services do not only require substantial investment in broadband-capable loops and other last-mile facilities that BellSouth references, but also in the DSLAMs, routers, splitters, and other equipment that are necessary to provide broadband services and applications. Indeed, the real value in broadband facilities is in the services and applications that can be delivered over them, and these rely critically on *separate* investment in electronics, additional systems, and the research and development that are required to provide broadband services and applications. But the natural monopoly character of last-mile broadband transmission facilities places the Bells and other ILECs in a position to block customers from accessing these services and applications. Unless competitors can lease these ILEC facilities on nondiscriminatory

---

(footnote continued from previous page)

Indeed, legal, market, or technological distinctions may *require* different regulatory requirements between platforms." *Id*. ¶ 7 (emphasis added). Dominant carrier (and unbundling) regulation of the Bells is warranted by market power considerations that simply have no analog in the cable, satellite or wireless environments. If the Commission de-regulates a carrier possessing market power in a vain attempt to encourage broadband deployment, it will only subject consumers and the public at large to the excessive prices, lack of innovation, and inferior service quality that characterize monopolistic and duopolistic markets. *See e.g.*, CC Docket No. 02-33, Comments of AT&T, filed May 3, 2002, at 72-80.

terms, competitors will have lessened incentives to invest in broadband development.[125] If the Commission permitted ILECs to foreclose access to bottleneck facilities -- as they will assuredly do in the absence of continued Title II common carrier and *Computer Inquiries* regulation -- then overall "investment in the development of innovative retail broadband services will be stifled."[126] BellSouth has not -- and cannot -- demonstrate that the public interest would be served by removing those regulations in vain hopes of increasing broadband deployment.

Since broadband services and applications require more than simple "dumb" broadband pipes, ILEC obligations to provide non-discriminatory access to last-mile facilities "promote investment in the electronic equipment and associated facilities required to transform voice-grade loops into broadband, for they allow these investments to be made by competitive LECs as well as incumbent LECs."[127] Moreover, Internet access services and applications also require development and management of the actual information that flows over the incumbent LEC-provided loops. ISPs, not the Bells, utilized the phone

---

[125] *See, e.g.*, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Seventh Annual Report on the Implementation of Telecommunications Regulatory Package, COM (2001) 310 final at 18-22 (finding that one of the keys to competitive broadband access is opening the local access network and recommending that the process be "speeded" up through "hands-on monitoring," "the setting of binding deadlines and the imposition of credible financial penalties on incumbents not complying with the requirements imposed").

[126] *Id.*; *see also* Comments of Cbeyond and Nuvox at 17-18 ("Proceedings such as this one, which question the importance of rules that have barely had an opportunity to take effect, serve only to divert resources of competitive carriers away from deploying networks and instead focus them on defending regulatory safeguards . . . .").

[127] *See, e.g.*, CC Docket No. 01-337, Comments of AT&T, Willig Decl. ¶ 70.

network to "offer an amazing array of Internet services . . . to virtually all Americans."[128] It was the ISPs, not the Bells, that developed and popularized "[t]he Internet's 'killer apps,' email and the World Wide Web, [which] developed and flourished by using our nation's phone lines."[129] And even though they have been limited by inferior access to the Bells' standalone broadband transmission facilities, ISPs have also been among the leaders in developing innovative broadband services and content.[130] Thus, the broadband record is clear: there is no question that ensuring that non-affiliated broadband competitors' non-discriminatory access to last-mile facilities promotes *both* competitive *and* ILEC investment.[131]

Indeed, the one clear lesson from the first "broadband" decade is that the ILECs are not leaders, but followers -- and reluctant ones at that -- in the deployment of broadband services.[132] The Commission cannot and will not "promote" broadband investment by removing the primary spur to ILEC broadband investment -- non-affiliated broadband providers' just, reasonable, and non-discriminatory access of to monopoly last-mile broadband transmission facilities. To the contrary, the Commission can

---

[128] Jason Oxman, The FCC and the Unregulation of the Internet, OPP Working Paper No. 31, at 5 (1999).

[129] *Id. See also AOL-Time Warner Merger Order* ¶ 137 (2001) ("Following AOL's pioneering efforts, IM became a mass market product in the late 1990s. In the short time since then, IM has mushroomed into a highly popular service, with an estimated 150 million users worldwide on AOL's IM services alone").

[130] See, e.g., CC Docket No. 01-337, Comments of AT&T, Willig Dec. ¶ 74.

[131] *See, e.g.*, *id.*, Reply Comments of AT&T, at 37-38 (filed April 22, 2002).

[132] *See, e.g.*, FCC Cable Services Bureau, *Broadband Today*, 27 (Oct. 1999) ("Although ILECs have possessed DSL technology since the 1980s, they did not offer the services, for concern that it would negatively impact their other lines of business.").

promote broadband investment only by rejecting BellSouth's request, and continuing to enforce Title II and *Computer Inquiries* obligations that ensure unaffiliated broadband competitors have non-discriminatory access to monopoly last-mile broadband facilities.

More fundamentally, BellSouth's claims about the public interest in the Internet are wholly misguided. To the extent that the Commission considers the public interest in the Internet in other proceedings, and seeks to promote innovation in broadband services and applications, it must address an entirely different set of issues.

The Internet has flourished because of its openness. Except for legitimate law enforcement and network integrity concerns, network owners do not tell narrowband subscribers which websites they may visit or which applications they may run over their Internet connections. Moreover, confidence in the fact that customers have unimpeded access to Internet content has given content providers the incentive to invest heavily in developing and delivering unique applications and services. If there is any appreciable risk that such access could be blocked by the entities that control the last-mile network facilities necessary for Internet access, the capital markets will restrict funding of broadband and IP-enabled services. Thus, an open access model is essential to the full and expeditious development of the broadband services, capabilities and applications.[133]

---

[133] AT&T's vision of an open Internet is wholly consistent with the notion of the "Four Freedoms of the Internet" articulated by Chairman Powell. The Four Freedoms are: (1) the freedom to access Internet content; (2) the freedom to use applications; (3) the freedom to attach personal devices; and (4) and the freedom to obtain service plan information. *See* "Preserving Internet Freedom: Guiding Principles of the Industry," Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age," University of Colorado School of Law, Boulder, Colorado, February 8, 2004.

To achieve the vital goal of ensuring an open Internet, the Commission will have to do two things. First, it must forbid any entity that provides broadband access from impeding end users' ability to access to the Internet content of any applications provider, except where such access would threaten the integrity of the network or where required by law. In order to assure that access to content is indeed controlled by customers, the Commission will not only have to forbid broadband access providers from blocking outright access to particular broadband services and applications, but also to prevent them from giving any kind of preferential access to their own broadband services and applications, or from degrading access to rivals' broadband services and applications. Thus, for example, to the extent that a broadband access provider deploys "quality of service" routing that would give priority to voice packets when there is network congestion, the Commission should make clear that network owners must make those identical capabilities available to all unaffiliated broadband services providers, such as VoIP providers, on the same basis as they provide those capabilities to themselves or their affiliates. Similarly, network providers should not be permitted to favor the transmission of their own data packets over unaffiliated providers' data packets. Such targeted regulation is essential to ensure that subscribers will be able to choose the broadband applications that they want to access, not the applications preferred by broadband transmission providers that control essential last-mile facilities.[134]

[134] AT&T emphasizes that it is *not* seeking here the "open access" leasing of last-mile broadband transmission facilities that the Commission is considering in its cable modem dockets. Rather, as described above, the Commission can directly prevent anticompetitive use of broadband transmission facilities and foster unimpeded access to broadband services and applications with modest technology-neutral *conduct* regulation

(footnoted continued on next page)

Second, the Commission must prohibit the ILEC practice of refusing to sell broadband Internet access to customers that do not purchase the incumbent's voice service.[135] This practice is clearly designed to entrench the incumbent LECs' local voice monopolies. The incumbents know that their DSL subscribers are often unwilling -- or simply unable -- to switch broadband service providers to obtain voice services from another carrier. Thus, by punishing DSL subscribers that would deal with local voice rivals, the incumbents have taken anticompetitive advantage of the high costs of switching to alternative broadband providers as a mechanism to prevent competition for those customers' voice service.

Allowing incumbent LECs to continue this practice threatens to devastate nascent broadband services and applications (such as VoIP services) that, as the Chairman recently recognized, might otherwise pose a direct threat to the incumbents' local monopolies.[136] Many VoIP subscribers, for example, may ultimately decide to drop their existing POTS service and instead use their DSL connection for both Internet access and

---

(footnote continued from previous page)

that merely prohibits broadband access providers from discriminating against unaffiliated broadband services, applications, and content, while otherwise giving those carriers substantial flexibility over the scope and terms of their retail service offerings.

[135] ILECs are doing so through a variety of means, either by flatly refusing to sell broadband Internet access to *any* customer that does not purchase the incumbents' voice service, or by allowing broadband access customers to use competitors' voice services only under certain conditions. *See, e.g.*, Georgia Public Service Commission, Docket No. 19393-U, Prefiled Direct Testimony of E. Christopher Nurse, filed November 19, 2004, at 5-9, 19-20.

[136] *Powell Says FCC Is Devising Ways To Deal With 15% Problem*, Communications Daily (May 5, 2004) ("If you're a big incumbent and you sort of enjoy the competitive advantages of being the owner of that kind of service system, you, in my opinion, ought to be terrified [of VoIP]").

voice services. But given that existing DSL subscribers generally will *not* drop their DSL service in order to choose a rival's traditional voice service, it is likely that the incumbent LECs could profitably impose this requirement in the VoIP context as well, and thereby immunize themselves from VoIP competition. Voice telephone subscribers simply will not pay additional money for competitive voice service when the ILEC requires them to purchase incumbent voice service in order to have DSL.

The incumbent LECs' current practices, of course, are only a few examples of the many ways they could devise to take advantage of their large and growing DSL customer base to prevent competition in the provision of broadband services, content, and capabilities. Instead of requiring subscribers to purchase POTS service as a condition of obtaining DSL service, an incumbent could just as easily require all DSL subscribers to also purchase its VoIP service. This would make it effectively impossible for rival VoIP providers to sell service to the incumbent's DSL customer base, for those customers would clearly be unwilling to pay twice for the same service. To prevent such market power abuses, the Commission must broadly prohibit *any* broadband transport provider from requiring subscribers to purchase *any* broadband service (or, in the case of incumbent LECs, local telephone service) as a condition of obtaining broadband Internet access service.[137]

[137] These targeted requirements would not, of course, prohibit legitimate bundling arrangements that offer customers the *option* of buying broadband Internet access service and broadband service (such as VoIP or any other broadband service or application) together at a single price, so long as the broadband transport provider also offered Internet access services as a stand-alone service at a just and reasonable price.

IV. CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted.

/s/ Clifford K. Williams
Leonard J. Cali
Lawrence J. Lafaro
Richard H. Rubin
Clifford K. Williams
AT&T Corp.
One AT&T Way
Bedminster, New Jersey 09721
(908) 532-1847
Counsel for AT&T Corp.

December 20, 2004

CERTIFCATE OF SERVICE

I hereby certify that on this 20th day of December, I caused true and correct copies of "AT&T's Opposition to Petition for Forbearance of BellSouth Telecommunications, Inc." via electronic mail on the parties listed on the attached service list.

Dated: December 20, 2004

/s/ Karen Kotula
Karen Kotula

SERVICE LIST

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite-TW-B204
Washington, DC 20554
(filed electronically)

Janice M. Myles*
Federal Communications Commission
Wireline Competition Bureau
Competition Polity Division
445 12th Street, SW
Suite 5-C140
Washington, DC 20554
(janice.myles@fcc.gov)

Best Copy and Printing, Inc.*
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554
(fcc@bcpiweb.com)

* via e-mail